A Modest Proposal to Pare Back Section 230 Immunity

The purpose of Section 230 of the Communications Decency Act of 1996 was to immunize online service providers from liability when posting third-party content: "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by *another* information content provider." *See* 47 U.S.C. § 230 (emphasis added).

As the Electronic Frontier Foundation (EFF) describes it, Section 230 is "one of the most valuable tools for protecting freedom of expression and innovation on the Internet." If the tech platforms were exposed to liability for third-party content, the logic goes, they would be forced to engage in a level of censorship that many would find objectionable. Small platforms might even shut down to limit their legal risk. EFF credits Section 230 for making the United States a "safe haven" that induces the "most prominent online services" to locate here. Indeed, U.S. online platforms have thrived, relative to their foreign counterparts, at least in part due to the protections from Section 230.

The protected intermediaries under Section 230 include Internet Service Providers (ISPs), as well as "interactive computer service providers," or what are now understood as tech platforms such as Facebook and Twitter (hosting third-party micro-bloggers), Google (hosting third-party content), YouTube (hosting third-party videos), and Amazon (hosting third-party reviews and merchandise).

The Concerns with Unbounded Section 230 Protections

In the last few years, Section 230 has come under fire from multiple political factions as being a tool for the largest platform companies to evade regulation writ large. Left-leaning politicians blame Section 230 for enabling misinformation (from Covid-19 to voting rights) and hate speech. And Senator Josh Hawley (R-MO) offered legislation that extends Section 230 protections only to platforms "operating in good faith," defined as not selectively enforcing terms of service or acting dishonestly.

Current laws shield Amazon from liability when experimental products end up killing or hurting Amazon.com shoppers. A Texas judge recently ruled that Amazon could not be held liable for failing to warn shoppers that a knockoff Apple TV remote control lacked a childproof seal on the battery compartment, which resulted in injury to at least one customer's child who swallowed the battery. That the product description came from a third-party Chinese vendor gave Amazon immunity under Section 230, despite the fact that Amazon may have recruited the low-cost supplier to its platform.

As noted by *American Prospect* editor David Dayen, Section 230 is "being extended by companies like Airbnb (claiming the home rentals of their users are 'third-party content') and Amazon (the same for the product sold by third parties on their marketplace) in ways that are downright dangerous, subverting consumer

protection and safety laws." Dayen proposes tying Section 230 protection to the banning of targeted advertising, "in the hopes that eliminating a click-bait business model would make hosting valuable content the only path to success." George Washington Law Professor Spencer Overton argues that Congress should explicitly acknowledge that Section 230 does not provide a defense to federal and state civil rights claims arising from online ad targeting, especially those aimed to suppress voting by Black Americans.

The Justice Department has proposed to limit Section 230 immunity if platforms violate free speech rights, "facilitate" violations of federal law or show "reckless disregard" to such violations happening on their sites.

Thwarting Congressional Intent

Implicit from the plain language of the statute is that the liability protections do not pertain when the online service provider offers its own content; else the phrase "another information content provider" serves no purpose.

By vertically integrating into content, and still claiming the liability shield of Section 230, the tech platforms have thwarted the original intent of Congress—not being held liable for content generated by "another information content provider." When the legislation was drafted in 1996, the tech platforms had not yet integrated into adjacent content markets, which likely explains why the statute is silent on the issue of content generated by the platform itself. In the 1990s, and even late into the 2000s, the tech platforms offered to steer users to the best content and then, in the infamous words of Google's Larry Page, "get out of the way and just let you get your work done."

Only in the past decade have platforms begun to leverage their platform power into the "edge" of their networks. For example, Google figured out that delivering clicks to third-party content providers was not as profitable as steering those clicks to Google-affiliated properties. According to a Yelp complaint filed with the European Commission in 2018, Google's local search tools, such as business listings and reviews from Google Maps, receive top billing in results while links to Yelp and other independent sources of potentially more helpful information are listed much lower. Because local queries account for approximately one third of all search traffic, Google has strong incentives to keep people within its search engine, where it can sell ads.

Google is not the only dominant tech platform to enter adjacent content markets. Amazon recently launched its own private-label products, often by cloning an independent merchant's wares and then steering users to the affiliated clone. Apple sells its own apps against independent app developers in the App Store, also benefitting from self-preferencing. And Facebook has allegedly appropriated app functionality, often during acquisition talks with independent developers. Facebook also integrated into news content via its Instant Articles program, by forcing news

publishers to port their content to Facebook's website, else face degraded download speeds. News publishers can avoid this degradation by complying with Facebook's porting requirement, but at a cost of losing clicks (that would have occurred on their own sites) and thus advertising dollars.

After holding hearings this summer, the House Antitrust Subcommittee is set to issue a report to address self-preferencing by the tech platforms. There are strong policy reasons for intervening here, including the threat posed to edge innovation as well as the limited scope of antitrust laws under the consumer-welfare standard. Among the potential remedies, there are two approaches being considered. Congress could impose a line-of-business restriction, along the lines of the 1933 Glass-Steagall Act, forcing the platforms to divest any holdings or operations in the edges of their platforms. This remedy is often referred to as "structural separation" or "breaking up the platform," and it is embraced by Senator Warren (D-MA) as well as Open Markets, a prominent think tank. Alternatively, Congress could tolerate vertical integration by the platforms, but subject self-preferencing to a nondiscrimination standard on a case-by-case basis. This remedy is fashioned after Section 616 of the 1992 Cable Act, and has been embraced in some form by the Stigler Center, Public Knowledge and former Senator Al Franken.

Tying Section 230 Immunity to Structural Separation

Consistent with this policy concern, and with the plain language of Section 230, the Federal Communications Commission (FCC) could issue an order clarifying that Section 230 immunity only applies when online service providers are carrying third-party content, but does not apply when online service providers are carrying their content.

As a practical matter, this clarification would have no effect on platforms such as Twitter or WhatsApp that do not carry their own content. In contrast, integrated platforms that carry their own content, or carry their own content plus third-party content, could only invoke Section 230 immunity with respect to their third-party content. This light-touch approach would not prevent Amazon, for example, from invoking Section 230 immunity when it sells a dangerous Chinese product.

An alternative and more aggressive approach would be to revoke 230 immunity for *any* content offered by an integrated online service provider. Under this approach, vertically integrated platforms such as Amazon and Google could retain Section 230 immunity only by divesting their operations in the edges of their platforms. Vertically integrated platforms that elect not to divest their edge operations would lose Section 230 immunity. The same choice—integration or immunity—would be presented to vertically integrated ISPs such as Comcast. This proposal could be understood as a tax on integration. Such a tax could be desirable because private platforms, especially those with market power such as Amazon and Facebook, do not take into account the social costs from lost edge innovation that results from self-preferencing and cloning.

The ideal regulatory environment would apply equally to all platforms—regardless of whether they operate physical infrastructure or virtual platforms—so as to eliminate any distortions in investment activity that come about from regulatory arbitrage. Under the current regulatory asymmetry, however, cable operators are subject to nondiscrimination standards when it comes to carrying independent cable networks, while Amazon is free to block HBO Max from Amazon's Fire TV Cube and Fire TV Stick, or from Amazon's Prime Video Channels platform. These issues deserve more attention and analysis than is presented here.

It's clear the original purpose of Section 230 is no longer being served, and the law is instead being exploited by the online platforms to maintain their immunity and to thwart any attempts to regulate them.

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